UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SAN FRANCISCO DIVISION OF JUDGES

SQUIRES LUMBER COMPANY, INC., and CARPENTERS LOCAL 2236, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA	Case Nos. 20-CA-160279 20-CA-162074 20-CA-162418 20-CA-162722 20-CA-162732 20-CA-162834 20-CA-166576 20-CA-167530 **RESPONDENT'S POST-HEARING BRIEF** DATES: February 22-26, 2016

Pursuant to Section 102.42 of the Rules and Regulations of the National Labor Relations Board (the "Board"), Squires Lumber Company, Inc. ("Squires" or "Respondent"), hereby submits its Post-Hearing Brief following the administrative hearing before Administrative Law Judge Mary Miller Cracraft.

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I. INTRODUCTION

Having failed to intimidate, coerce and/or trick Squires into recognizing it, and apparently unsure of its ability to demonstrate majority support to prevail in a secret ballot election, the Union now asks the Administrative Law Judge to provide it with the extraordinary remedy of a *Gissel* bargaining order. Neither the established legal authority nor the evidence at the hearing supports the Union's end-run strategy to avoid the Board's traditional—and favored—election procedures.

As a matter of law, the Union is not entitled to a *Gissel* bargaining order because it cannot, and did not, establish that it ever had majority employee support in an appropriate bargaining unit. When it made its failed attempt—as even Region 20 of the Board agreed—to trick Squires' Operations Manager to recognize the Union, it only had the support of three employees, but needed at least seven for a majority.

Further, as the evidence demonstrates, Squires had legitimate and non-discriminatory reasons for the conduct alleged to constitute unfair practices. Regarding the termination of Bobby Saephan's employment, which is the only alleged unfair practice that rises above a minor, technical violation, Squires established that Saephan failed to comply with its legitimate request to "hang-tight" and complete a drug test. Setting aside the confusion around the correct testing center, and Saephan's participation in the picketing on Friday, October 16, the undisputed facts show that he directly disobeyed instructions to complete his drug test that day. He directly disobeyed Operations Manager John Gilfillan's instruction to "hang tight" while Gilfillan located an available testing center; and, despite reviewing a text from Human Resources Manager Kelly Bankston that morning identifying an available testing center, he failed to respond to Bankston or to report to the available testing center even though he finished picketing before 1:00 p.m. that afternoon.

Finally, the General Counsel failed to offer evidence to meet its burden to establish that an extraordinary remedy like a *Gissel* bargaining order is necessary because traditional remedies would be insufficient. To the contrary, the evidence reflects that traditional remedies would be more than adequate considering that Squires always has been very open with its employees that it will recognize and bargain with the Union if in fact the majority of the employees support the Union through an election. Moreover, as the record evidence confirms, Squires has already taken

steps to remedy even *alleged* violations, such as by posting notices assuring employees of their rights and issuing a revised Employee Handbook. And, of course, the only original employee to whom a bargaining order would apply is Francisco Martinez, the Union salt. If the Union gets its way here, multiple employees will have been completely disenfranchised from having a say in whether the Squires facility becomes unionized.

Accordingly, for the reasons set forth below, Squires respectfully requests that the Union not be rewarded for its attempts to avoid the safeguards of a Board-conducted secret ballot election.

II. FACTUAL BACKGROUND

A. Squires Lumber Company

Squires Lumber Company is a family-owned business, founded in 1946. Transcript of Arbitration Hearing, "Tr." 646:18-647:9. It is headquartered in the City of Colton, which is located in the Inland Empire in Southern California. *Id.* Pam Paxson is Squire's CEO. Tr. 646:18-24. Her two sons, Chris and Kyle, are its President and Vice President, respectively. *Id.* They are responsible for running Squires' daily operations. *Id.*

Squires is a lumber wholesaler and a panel form builder for various construction projects. Tr. 647:10-648:10. It is a major supplier to contractors throughout California, primarily for commercial, but also some residential, purposes. *Id.* Its customers typically provide panel form schematics, which Squires then builds for them. The customers' schematics are considered confidential, and Squires treats them as such. Tr. 657:8-10.

Squires also owns a transportation company called SLC Transportation, which is a wholly-owned subsidiary. Tr. 648:20-649:16. SLC Transportation's truck drivers transport Squires' products, including concrete panel forms, to customers. *Id.* One such driver works out of Squires' Suisun City facility.

B. April 2015: Squires Opens Its Northern California Facility And Hires Temporary Workers.

In or about April 2015, Squires opened a small Northern California facility in Suisun City (Solano County), California. Tr. 651:9-652:1. It hired John Gilfillan as that site's Operations Manager. Tr. 7435-8, 743:24-744:1. In addition to hiring Gilfillan, Squires had its Yard Manager

at the Colton site, Mauricio Vargas, spend approximately three months at the Suisun City site to help set up the operations there. Tr. 709:18-710:10.

Squires contracted with temporary staffing agencies to get millworkers for the Suisun City site. Tr. 892:25-893:12. If Squires was satisfied with a temporary worker's performance—normally after 500 hours or so—it would hire the temporary worker as a direct employee if there was a need at that time. Tr. 893:13-19, 894:10-21. The temporary workers function just like direct employees, working on the same projects, taking the same breaks, reporting to the same management, physically working in the same location, and working in close proximity to each other. Tr. 898:16-899:23.[1] Squires only hires direct employees after they had spent some time performing as temporary workers. Tr. 669:22-25, 893:13-24. To date, Squires has hired four temporary workers as direct employees: Francisco Martinez, Bobby Saephan, Louis Morabito, and Jonathan Van Loo.[2] Tr. 894:22-895:4.

1. Francisco Martinez

Squires' new operation competed directly with unionized employers in the Northern California area. Concerned about this, the Union directed one of its own employees, Francisco Martinez, to seek employment at Squires' Suisun City site in or about June 2015 in order to attempt to organize Squires' workforce. Tr. 398:16-399:11, 542:13-24, 543:18-544:13. After speaking with Vargas and Gilfillan, and informing them about his industry experience, they sent him to a temporary staffing agency with which Squires had contracted. *Id.* Subsequently, Martinez started working as a temporary employee at the Suisun City site. *Id.*

Unbeknownst to Squires at the time, Martinez in fact was and is a union "salt."[3] Tr. 80:3-12. In addition to his employment with Squires, Martinez works as a Union field representative,

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[1] In the rebuttal phase of this case, the Union's primary witness, Francisco Martinez, attempted without success to draw distinctions between the job duties of the direct and temporary workers. Martinez worked both as a temporary and regular worker, and his admissions on cross-examination confirmed the almost complete overlap of job duties between the two groups. *See* 1012:6-1013:11, 1014:25-1015:20.

[2] Caleb Alvarez, a Squires direct employee who transferred from its Colton site, also works at the Suisun City site. Tr. 893:20-21. In addition, Patrick O'Leary, a driver for SLC Transportation, works out of the Suisun City location. Tr. 649:10-650:4. He is managed by Squires. *Id.*

[3] In *Hartman Brothers Heating and Air Conditioning, Inc. v. NLRB*, 280 F.3d 1110 (7th Cir. 2002), Judge

drawing wages from the Union that far exceed his Squires wages. Tr. 397:8-398:13, 538:5-6. The Union pays him $40 per hour (minus the $13 per hour he earns at Squires) plus benefits, such as health care and pension. Tr. 539:22-540:5. The Union also pays for a truck for Martinez to drive. Tr. 540:13-15. Prior to seeking a job with Squires, Martinez worked for Channel Lumber, which is a unionized competitor of Squires in Northern California. Tr. 541:19-22, 542:10-12. Upon leaving his Channel Lumber employment to start working for the Union, the Union instructed Martinez to get hired by Squires and then to organize Squires' employees. Tr. 542:13-24, 543:18-544:13.

To date, Martinez still is a Squires direct employee. Tr. 397:8-9. Other than receiving three warnings, Martinez remains an employee of Squires in good standing.

2. Bobby Saephan

On April 21, 2015, Bobby Saephan started working as a millworker at Squires' Suisun City site. Tr. 172:1-2, 173:3-4. He was placed there through one of the temporary staffing agencies with whom Squires worked. Tr. 172:8-15. On or about August 12, 2015, Squires hired Saephan as a direct employee. Tr. 181:11-15, 182:17-20. Squires terminated Saephan's employment on October 19, 2015, for failing to comply fully with Squires' instruction that he take a drug test. Tr. 960:12-25, Tr. 961:3-962:20, Ex. R-8.

3. Louis Morabito

Louis Morabito also started at Squires' Suisun City site as a temporary worker. On July 29, 2015, Squires hired him as a direct employee. Tr. 901:17-20, Ex. R-55. Squires eventually terminated Morabito's employment effective September 30, 2015. Exs. R-55 and GC-29. The Union filed an unfair labor practice charge alleging that Squires terminated Morabito's employment for engaging in concerted protected activities. Tr. 83:22-84:5. Region 20 of the

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Posner recognized one viewpoint that holds that salting really is designed to elicit unfair labor practices by employers rather than actual organizing. Squires believes that was the Union's intent here, *viz.*, to precipitate unfair labor practices so that it could use the Board's processes to seek a *Gissel* bargaining order rather than a traditional secret ballot election.

Board, however, rejected the Union's charge. *Id.* The General Counsel and Union have stipulated to the fact that Squires' termination of Morabito's employment did not violate the Act.[4]

4. Jonathan Van Loo

In August 2015, Jonathan Van Loo began working for Squires at its Suisun site as a temporary worker. On October 1, 2015, Squires hired Van Loo as a direct employee. Tr. 684:23-685:7, Ex. R-55. To date, Van Loo still is a Squires direct employee. *Id.*

C. September 2, 2015: The Union Ambush.

In the early morning of September 2, 2015, before the workday at the Suisun City site had started, two Union organizers, along with the three Squires direct employees, ambushed Operations Manager Gilfillan, barging into his private office through the warehouse and intimidating him with a video camera. Tr. 781:24-783:18. The five individuals were led by a Union organizer named Tim Lipscomb. Tr. 29:8-15. The only individual Gilfillan initially recognized was Morabito. Tr. 783:10-12. Gilfillan did not know what was happening and was scared and nervous. Tr. 660:9-13, 665:19-23. He had not yet taken his daily anti-anxiety medication. Tr. 787:12-20. (He actually stopped the "meeting" so he could do so.) The Union organizer handed Gilfillan a piece of paper that Gilfillan did not review. Tr. 785:8-25.

After Gilfillan notified his management (the Paxsons) about the Union organizers' unannounced surprise appearance in his office, they instructed Gilfillan to take steps to secure the facility going forward, so that he would not be ambushed again by uninvited persons, including (1) keeping the outside gate to the facility closed (but not locked), and (2) keeping the door to his office and the outside interior office shut and locked to maintain the security of all of the confidential and proprietary information in those offices, such as panel drawings, panel bids, customer deliveries, and truck routes. Tr. 663:24-15, 666:14-667:23.

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[4] Thus, whenever the General Counsel in its brief argues that two of the original three direct employees have been terminated, it is important to remember that there is no dispute about the propriety of one of those two terminations. The only termination at issue here is Saephan's, and, as set forth more fully below, his termination related solely to his refusal of Respondent's instructions to "hang tight" at the drug testing clinic.

On or about October 1, 2015, Squires' management held a meeting with all employees at its Suisun City. Tr. 670:4-674:3, Ex. GC-23. At the meeting, Kyle Paxson, among other things, informed the employees that Squires was a law-abiding company that would recognize the Union if an election petition was filed and the Union was voted in. *Id.* He confirmed that if employees wanted to organize, that Squires would accept and recognize that without any retaliation or retribution. Tr. 677:4-678:21, Ex. GC-23.

But because it apparently views a *Gissel* bargaining order as more easily achievable than a victory in a Board-supervised secret ballot election in a three-person unit, the Union never has filed an election petition. This is remarkable, as all three direct employees (Martinez, Saephan, and Morabito) who signed the September 2 petition were employed through the entire month of September.[5] Tr. 79-80. The Union still never has filed an election petition. *Id.*

D. October 14, 2015: Martinez And Saephan Refuse To Work Mandatory Overtime, So Squires Issues Them Verbal Written Warnings.

On October 14, 2015, Squires gave a documented verbal warning to both Martinez and Saephan for not working mandatory overtime the previous day. Tr. 930:10-17, Ex. GC-24; Tr. 934:17-935:2, Ex. GC-13. Both employees were well aware of their obligation to work overtime when requested. Martinez previously had been warned verbally for failing to work mandatory overtime. Tr. 926:17-22. Contrary to his testimony at the hearing that he was unaware of such a rule, Martinez also had signed an application form with Squires specifically acknowledging that working overtime is a required duty and that he was willing to do so. Tr. 577:8-21, 580:8-22, Ex. R-36. In addition, both Martinez and Saephan had acknowledged receiving the Company's employee handbook and abiding by the policies set forth therein, including that employees may be required to work overtime as necessary. Tr. 307:18-21, 580:23-581:21.

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[5] The Union also at first asserted that Gilfillan, despite his obvious confusion, had agreed to recognize the Union, even going so far as to file an unfair labor practice charge alleging that Squires withdrew that recognition and refused to bargain with the Union. Tr. 84:6-15. The Union, however, later withdrew that charge as without merit. *Id.*

E. October 15-20, 2015: Saephan Fails To Comply With Squires' Instruction That He Complete A Drug Test, So Squires Terminates His Employment.

On Thursday, October 15, 2015, Kelly Bankston, Squires' Human Resources Manager and Safety Coordinator, received a report from Caleb Alvarez that an employee had smelled marijuana on Saephan during a break. Tr. 939:8-16. As she would any time either Gilfillan or Alvarez informed her an employee smelled of marijuana, Bankston recommended that, based on reasonable suspicion, Saephan should be sent to get a drug test.[6] Tr. 940:15-19, 983:15-22. Her management agreed with her recommendation. Tr. 941:11-12. Bankston contacted the testing facility with whom Squires contracted to schedule Saephan's drug test. Tr. 941:13-944:7, Ex. GC-9. Bankston was told to send Saephan to North Bay Vacaville Hospital for the test. Tr. 942:20-943:8. Bankston then printed out and completed the necessary paperwork and provided it to Saephan. Tr. 944:8-947:25, GC-9.

When Saephan arrived at the Vacaville Hospital location, he was told that he should go to a different testing location, which was in Fairfield. Tr. 249:5-23. Saephan contacted Gilfillan regarding this change. *Id.* Gilfillan told Saephan to hold on until he spoke to Bankston and would call Saephan back. Tr. 249:24-250:7. Shortly, thereafter, Gilfillan called Saephan to tell him to go to the Fairfield location (as he had been told at the Vacaville Hospital). *Id.*

When Saephan arrived at the Fairfield location, however, he saw a sign reflecting that the location was closed for the day. Tr. 250:14-251:25. He called Gilfillan to let him know. *Id.* Gilfillan texted Saephan back to instruct him to return to the Fairfield location at 7:30 a.m. the next morning to take his drug test. Tr. 252:1-7. This turned out to be an incorrect location, but Gilfillan simply was relying on information provided by Squires' insurance broker. Tr. 819:4-7.[7]

On the morning of Friday, October 16, Saephan returned to the Fairfield testing facility just before 7:30 a.m.[8] Tr. 261:25-262:7. He saw that it was closed again and texted a picture to

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[6] Bankston had gotten to know Alvarez well during the three years they both worked at the Colton site and had no reason to doubt his report of reasonable suspicion. Tr. 940:9-14.

[7] The General Counsel's suggestion that Squires was "horsing [Saephan] around" by purposely sending him to the wrong drug testing facility is ludicrous. These were honest mistakes being made in "real time." No union animus was involved.

[8] Prior to going to the Fairfield testing center, Saephan showed up at the Suisun City site along with

Gilfillan of the sign reflecting the closure. *Id.*, Ex. GC-15. Gilfillan responded by instructing Saephan specifically to "hang tight." *Id.* Although he responded "okay," Saephan did not hang tight.[9] He did not obey Gilfillan's instruction to stay where he was while Gilfillan called Squires management and wait for further instructions regarding an alternate testing center location. Tr. 264:7-265:1, 822:25-823:2. Instead, he simply left the testing site and returned to the worksite in Suisun City to participate in the Union's picketing that morning. Tr. 264:24-265:1.

Upon learning of the mix-up regarding the Fairfield testing center being closed again, Bankston texted Saephan the address of an alternate testing facility to which he should go. Tr. 953:18-23, Ex. R-15. Saephan did not respond to her the entire day, even though he saw her text shortly after she sent it, and even though the picketing ended before 1:00 p.m. that day. Tr. 266:19-23, 487:11-13, 954:5-11. When the alternate testing center informed Bankston that Saephan never showed up, she discussed possible next steps with Squires management. Tr. 955:12-24. Management decided to suspend Saephan for failing to comply with the Company's drug test request pending further investigation. Tr. 955:25-956:7.

Bankston created a suspension notice and helped deliver it to Saephan. Tr. 956:13-959:14, Ex. R-3. She told Saephan that he had until 4:00 p.m. that day to provide a response. *Id.* Saephan e-mailed Bankston a written response. Tr. 960:4-11, R-8. After reviewing Saephan's response, which provided no legitimate excuse for his disregarding the "hang tight" instructions, Squires decided to terminate Saephan's employment for failing to comply with its instructions to complete a drug test. Tr. 960:12-25, Tr. 961:3-962:20, Ex. GC-18. The following day, on October 20, 2015, Gilfillan and Bankston met with Saephan to inform him of the termination of his employment. Tr. 962:7-20.

Martinez and other Union representatives to give Gilfillan a petition stating that they would be engaging in a work stoppage that day. Tr. 259:19-261:3, Ex. GC-4. Gilfillan never saw Saephan or the petition that morning. Tr. 797:10-13. Nor did Squires have any prior knowledge of the Union's planned work stoppage that day. Tr. 333:10-334:4.

9 "Hang tight" means "to remain in one's current location" (per Wiktionary), "to await further instructions" (per Urban Dictionary), and/or "to wait before doing anything" (per Meriam-Webster). It clearly does not mean "leave the drug testing site." Saephan speaks and reads English proficiently (he testified in English at the hearing), and it begs credulity to suggest that he did not understand this instruction to hang tight.

Despite Saephan's Squires employment ending, he never was unemployed because the Union had hired him the previous day (October 19). Tr. 171:15-17. The Union already had promised to take care of him with a job if Squires terminated his employment. Tr. 282:23-283:14.

F. October 21, 2015: Martinez Fails To Clock Out On Two Different Days, So Squires Issues Him A Written Warning.

On October 21, 2015, Bankston was doing payroll when she noticed blank spots on Martinez's time cards for October 7 and 14, 2015. Tr. 907:19-908:6, Exs. R-35 and GC-21. She checked other employees' time cards for those same dates, and confirmed that there was no mechanical issue with time clock. Tr. 911:22-917:2, Ex. 58-60. Bankston asked Gilfillan to follow up with Martinez regarding an explanation for the missing entries. Tr. 908:21-911:5. A couple of hours later, she received a copy of Martinez's time card with Gilfillan's notations on each date in question that Martinez "missed punch." *Id.* Bankston informed management that this was not the first time Martinez had failed to clock in or out. Tr. 911:6-21.

Gilfillan and Bankston met with Martinez that afternoon to present him with a written warning for failing to clock out on the two dates in question. Ex. R-35. Martinez unconvincingly attempted to blame his failure to clock out on mechanical issues with the time clock machine. Tr. 835:25-836:13, 919:5-25. Gilfillan never heard any other employee complain that the time clock machine was not working properly. Tr. 835:25-836:13. Saephan also never experienced any time clock malfunction. Tr. 308:13-25

G. December 10, 2015: Martinez Took Excessive Restroom Breaks And Disclosed Squires Confidential Information, So Squires Issued Him A Final Warning.

On December 10, 2015, Gilfillan and Bankston met with Martinez to issue him a Final Warning for disclosing confidential information to outside entities and for taking excessive restroom breaks, which were affecting his productivity and performance. Tr. 836:14-837:6, 932:21-933:4, Ex. GC-26. Martinez was observed surreptitiously trying to remove a confidential drawing from the workplace. *Id.* When confronted, Martinez at first tried to deny his conduct, but then admitted it. Ex. GC-26. During the meeting, Martinez tried to explain his improper conduct

by claiming that he saw a paper on the ground and picked it up and placed it in his pocket thinking that that wind must have blown it outside. Tr. 839:7-15.

Further, over the course of several months, Gilfillan observed Martinez taking excessive restroom breaks—as many as 15 per day. Tr. 837:9-20. Gilfillan also noticed a pattern of Martinez using the restroom every time a lumber truck either arrived into the Suisun City facility or was leaving the facility. Tr. 837:21-838:8. The Union would then follow and harass the drivers and customers.[10] During the meeting, Martinez neither denied the allegation nor provided an explanation for his excessive restroom breaks. Tr. 839:19-24.

III. ANALYSIS

Although typically the question of appropriate remedy is addressed following an analysis of the substantive charges, this is not a typical case. This case is all about the Union's singular goal: obtaining a *Gissel* bargaining order without the risk of going through a Board-supervised secret ballot election. From Day 1, Squires consistently has confirmed that it would abide by the results of such an election. No employee has lost a penny of income as a result of Squires' actions in response to the Union's "cram-down" tactics. Even Saephan, the only termination the General Counsel challenges, immediately obtained replacement employment with the Union the day his Squires employment ended.

Here, the Union "salted" Squires so that it could unionize the Squires workplace. Then, despite both the Board's and the U.S. Supreme Court's stated strong preference for secret ballot elections, the Union never even considered an election. If the Union truly had 100 percent of the employees committed to voting "yes," it makes no sense not to have filed a petition. Instead, it first tried to ambush Squires' Operations Manager to coerce or trick him into recognizing the Union. And when that strategy did not work (and in fact was rejected by the General Counsel), the Union set about filing one unfair labor practice charge after another regarding minor issues in an effort to support a bargaining order demand. Because the Union's goal of obtaining a bargaining order at any cost is what this case is about, Squires addresses the appropriate remedy issue first.

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[10] Some of the Union's conduct was found violative of Section 8(b)(4) of the Act in a separate unfair labor practice charge.

A. NLRB Did Not Meet Its Burden To Establish It Is Entitled To Bargaining Order.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court identified two categories of employer misconduct that may warrant imposition of a bargaining order absent an election. *T-West Sales & Service, Inc.*, 346 NLRB 118, 121 (2005), enfd. 265 Fed. Appx. 547, 550 (9th Cir. 2008) (citing *Hialeah Hospital*, 343 NLRB 391, 395 (2004)). The first category is "exceptional" cases, those marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible. *Id.*; *Gissel* at 613-614. The second category involves "less extraordinary cases marked by less pervasive practices which nonetheless still have a tendency to undermine majority strength and impede election processes." *Id.*; *Gissel* at 614. In the latter category of cases, the "*possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight* and [, therefore,] employee sentiment once expressed [by authorization] cards would, on balance, be better protected by a bargaining order." *Id.* (Emphasis added.) "**A *Gissel* bargaining order, however, is an extraordinary remedy**." *Aqua Cool*, 332 NLRB 95, 97 (2000) (emphasis added); *see also Hialeah Hospital*, 343 NLRB 391, 395 (2004). "The preferred route is to provide traditional remedies for the unfair labor practices and to hold an election, once the atmosphere has been cleansed by those remedies." *Id* (citing *Aqua Cool* at 97).

This is not an "exceptional" case marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible. Other than Saephan's discharge, for which Squires had a legitimate basis given his failure to comply with its instructions regarding completing a drug test, the other ULP charges at most allege minor, technical violations—*e.g.*, a few written warnings that did not substantively impact Martinez's employment with Squires (which continues to this day), a few allegedly unlawful handbook provisions that Squires never enforced against any discriminatee and which have been cured, and an alleged videotaping lasting 14 minutes that did not impact any employee in any manner. Saephan's discharge, even if unlawful (which it was not), cannot itself,

or in combination with the other alleged technical violations, make this an "exceptional" case. *Gissel* at 613-614. At most, this case falls into the second category of cases.

To prove entitlement to a *Gissel* bargaining order in the second category of cases, the heavy burden is on the General Counsel to establish that (1) the Union enjoyed a preelection majority in the relevant unit; (2) the employer committed an unfair labor practice; (3) the unfair labor practice caused the Union's majority status to be dissipated; (4) the possibility of conducting a fair election would be slight; (5) the employees' preelection sentiments would be better protected by a bargaining order than by a new election. *Overnite Transportation Co. v. NLRB*, 280 F.3d 417, 436 (4th Cir. 2002). "In turn, to find that the possibility of conducting a fair election would be slight and that employees' previolation sentiments would be better protected by a bargaining order, the Board must specifically consider and make findings about (a) the likelihood of recurring misconduct; (b) the residual impact of unfair labor practices, considering whether that effect has been or will be dissipated by the passage of time; and (c) the efficacy of ordinary remedies." *Id.* "In determining the propriety of a remedial bargaining order, the Board examines the seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations, the size of the unit, the extent of dissemination among employees, and the identity and position of the individuals committing the unfair labor practices." *T-West Sales* at 121 (citing *Garvey Marine, Inc.*, 328 NLRB 991, 993 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001). Accord: *Holly Farms Corp.*, 311 NLRB 273, 281 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), cert. denied in pertinent part 516 U.S. 963 (1995). As the facts here establish, a remedial bargaining order is not justified in this case because the General Counsel has failed to meet its burden to establish (1) that the Union had majority support in the relevant unit at the time it made a demand for recognition, (2) that Squires committed unfair labor practices, and (3) that the possibility of conducting a fair reelection would be slight.

The Board's *T-West Sales* decision is instructive here. In *T-West Sales*, the Board concluded that the employer had committed a number of unfair labor practices, including maintaining an unlawful no-solicitation rule, unlawfully interrogating employees, soliciting employees to report on other employees' union activities and creating an impression of

surveillance, unlawfully discharging the principal employee organizer, and making statements to another employee linking that discharge to the discharged employees' organizational activities. Despite finding these unlawful practices, including several "hallmark violations," the Board nonetheless determined that a bargaining order was not appropriate because the employer's unlawful conduct could be redressed adequately by traditional remedies. *T-West Sales* at 122 ("the commission of 'hallmark' violations does not always allow for the imposition of this extraordinary remedy"); *see also Hialeah Hospital* at 395-396 (no *Gissel* bargaining order where the employer committed a retaliatory discharge and multiple 8(a)(1) violations, including threats, surveillance, promises of benefits, and removal of benefits, in a 12-employee unit); *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069 (2004) (no *Gissel* bargaining order where the employer, among other things, granted a unit-wide wage increase, discharged a leading union activist the day before the election, threatened employees with plant closure, and engaged in surveillance); *Desert Aggregates*, 340 NLRB 289, 293-294 (2003) (no *Gissel* bargaining order where the employer unlawfully solicited and promised to remedy employee grievances and laid off for 3 months 2 leading union supporters in a unit of 11 employees); *Burlington Times, Inc.*, 328 NLRB 750, 752 (1999) (Board declined to issue a bargaining order where an employer threatened to close the plant, made noneconomic grants of benefits, promised to improve wages and other benefits, and solicited grievances in a unit of 11 employees); *Almet, Inc.*, 305 NLRB 626 (1991) (employer's multiple 8(a)(1) violations and a single 8(a)(3) violation were not sufficient to warrant issuing a *Gissel* bargaining order); *Sunbeam Corp.*, 287 NLRB 996, 999 (1988) (employer's 8(a) (1) violations and a single 8(a) (3) refusal to recall were "isolated incidents" not sufficient to warrant issuing a *Gissel* bargaining order).

Here, Squires' alleged unlawful conduct (even if all of it was believable) is far less severe and less pervasive than the *T-West Sales* employer's unlawful practices. Unlike the *T-West Sales* employer, Squires is not accused of multiple "hallmark violations" or maintaining an unlawful no-solicitation rule or unlawfully interrogating employees or soliciting employees to report on other employees' union activities or of discharging the principal employee organizer. At most, Squires is charged with a single "hallmark violation" and several technical violations. Further, only two

(Martinez and Saephan) of the approximately seven to ten millworkers that worked at the Suisun City site every day were affected materially by the alleged violations. Tr. 668:20-24. Given the Board's refusal to approve a *Gissel* bargaining order under the more severe and pervasive conditions in *T-West Sales*, a *Gissel* bargaining order is not justified here. *See also Hialeah Hospital* at 395-396; *Burlington Times, Inc.* at 752.

B. Because The General Counsel Failed To Prove That The Union Ever Had A Majority In The Relevant Unit, It Is Not Entitled To A Bargaining Order.

Majority support is a necessary prerequisite for a *Gissel* bargaining order to be issued. *See NLRB v. Davis*, 642 F.2d 350, 352 (9th Cir. 1981); *see also Holly Farms Corp.*, 311 NLRB 273, 280 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), aff'd 517 U.S. 392 (1996). The General Counsel failed to establish that the Union had majority support here. Indeed, the evidence demonstrated otherwise.

Between September 2, 2015—the date on which the Union ambushed Gilfillan seeking to coerce Union recognition—and February 22, 2016, Squires at all times employed between 7 and 12 employees at its Suisun City site. Tr. 900:1-12, Ex. R-55, 194:19-25, 399:12-15. The General Counsel did not offer any evidence to establish that the Union had majority support of the employees at any time during that time period. At most, the General Counsel offered evidence that the Union had 3 supporters on September 2, but that is far short of the majority it needed at the time—the site had 12 employees at the time, so a majority would have been 7 or more—to be entitled to a *Gissel* bargaining order. Tr. 900:1-12, Ex. R-55. Because the General Counsel failed to establish that the Union had majority support, which is a necessary prerequisite, it is not entitled, as a matter of law, to a *Gissel* bargaining order. *Davis*, 642 F.2d at 352; *Holly Farms Corp.* at 280.

Squires anticipates that the General Counsel will attempt to evade its evidentiary and legal shortcoming by contending that the bargaining unit consists only of Squires' three direct employees on September 2. Its contention fails. It is undisputed that Squires is a single user employer that employs both direct employees and temporary employees to perform the same responsibilities.

See M. B. Sturgis, 331 NLRB 1298 (2000).[11] As such, to determine the appropriate unit, the traditional community of interests factors test should be applied. *Id.* at 1305. "Under Section 9(b) of our statute, a group of an employer's employees working side by side at the same facility, under the same supervision, and under common working conditions, is likely to share a sufficient community of interest to constitute *an* appropriate unit. *See Swift & Co.*, 129 NLRB 1391 (1961); *and Kalamazoo Paper Box*, 136 NLRB 134 (1962)." *Id.* (Italics in original.)

As the evidence demonstrated, at Squires' Suisun City facility, the direct employees worked side by side with the temporary employees performing the same responsibilities, under the same supervision, and under the same working conditions. Tr. 153:22-154:21, 288:15-289:15, 898:16-899:23, 1012:6-1013:11, 1014:25-1015:20. Indeed, except for one employee that it transferred from its Southern California facility (Caleb Alvarez)[12], Squires hired all of its direct employees Squires after they had spent some time performing as temporary workers—*i.e.*, after they had demonstrated as temporary employees the ability to perform the same duties they would continue performing as direct employees. Tr. 669:22-25, 893:13-24, 1012:6-1013:11, 1014:25-1015:20.

Accordingly, on September 2, 2015, the proper bargaining unit consisted of 12 employees, not 3 as the General Counsel likely will contend. Therefore, as set forth above, the General

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[11] Notably, on May 18, 2015, the Board granted review of a Regional Director's 2012 decision to dismiss a union election petition in *Miller & Anderson, Inc.* (Case No. 05-RC-079249 (May 18, 2015). In the *Miller & Anderson* matter, the union is urging the Board to overrule *Oakwood Care Center*, 343 NLRB 659 (2004) and adopt a test asking: "what work is being done and who is the work being done for?" In other words, the union is asking for a return to the *M. B. Sturgis* rule. By granting review, the Board appears to have signaled its intent to return to the *M. B. Sturgis* rule.

[12] Although the General Counsel may attempt to argue that Alvarez was a supervisor, the evidence clearly demonstrated otherwise. Alvarez never issued anyone discipline or warnings, never hired or fired anyone, never gave any performance evaluations, never made any decisions changing anyone's compensation, and never approved time off. Tr. 157:11-25, 292:22-294:22. Rather, he worked alongside employees as their lead. Tr. 156:5-8, 156:23-25, 158:13-18. Leads or foremen like Alvarez are not supervisors within the meaning of Section 2(11) of the Act. *See Iron Workers Local 28 (Virginia Assn. of Contractors)*, 219 NLRB 957, 961 (1975) (a group of working foremen and a general foreman were found not to be statutory supervisors when they acted "within a very limited sphere in giving instructions to employees, bounded by the blueprints and instructions from the contractor or his supervisor"); *see also Diversified Enterprises*, 353 NLRB 1174 (2009); *Electrical Workers IBEW Local 3 (Cablevision)*, 312 NLRB 487, 488–489 (1993); *George C. Foss Co.*, 270 NLRB 232, 234–235 (1984), enfd. 752 F.2d 1407 (9th Cir. 1985); *Ogden Allied Maintenance Corp.*, 306 NLRB 545, 546 (1992), enfd. 998 F.2d 1004 (3d Cir. 1993).

Counsel failed to meet its burden to establish that necessary majority support element. *Davis*, 642 F.2d at 352; *Holly Farms Corp.* at 280.

The General Counsel's failure further is highlighted by the fact that the Union never even tried to file an election petition. "[E]lections are the preferred method for ascertaining employee sentiment." *United Steel Workers v. NLRB*, 482 F.3d 1112, 1117 (2007) (quoting *NLRB v. W. Drug*, 600 F.2d 1324, 1326 (9th Cir. 1979) (affirming Board's decision to overturn ALJ's grant of a bargaining order where employer had disciplined and fired two employees for supporting union-organizing drive, disciplined a third employee for union support, threatened a fourth employee with reprisal if he supported the union, and removed union literature from posting areas while permitting non-union notices to remain posted); *see also Gissel*, 395 U.S. at 602 ("The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory indeed the preferred method of ascertaining whether a union has majority support.") Despite apparently having at least three supporters, including all of the direct employees (as of September 2 when the Union tried to ambush Gilfillan), it never has filed an election petition through today. Rather, in an evident concession that it did not have majority support and in an attempt to bypass the preferred election process—which very likely would expose its inability to garner majority support—it instead now seeks a bargaining order to be imposed on Squires. The Union's attempt to shortcut the traditional and proper procedures should not be rewarded.

C. Because The General Counsel Failed To Meet Its Burden To Prove The Alleged Unfair Labor Practices, It Is Not Entitled To A Bargaining Order.

1. The General Counsel Did Not Prove That Squires Retaliated Against Employees In Violation Of Section 8(a)(3) For Organizing A Union.

To establish that Saephan's discharge and discipline and Martinez's discipline were unlawful, the General Counsel must show, by a preponderance of the evidence, that their Union activity was a motivating factor in Squires' decisions to discipline them and terminate Saephan's employment. *See Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). If the General Counsel can make this showing, the burden shifts to Squires to show that it would have taken the same action even in the absence of the protected activity. *Id.*

"The Board does not have authority to regulate all behavior in the workplace and it cannot function as a ubiquitous 'personnel manager,' supplanting its judgment on how to respond to unprotected, insubordinate behavior for those of an employer." *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1105 (D.C. Cir. 2001) (emphasis added). **"It is well recognized that an employer is free to lawfully run its business as it pleases. This means that an employer may discharge an employee for a good reason, a bad reason, or no reason, so long as it is not for an unlawful reason."** *Id.* (citing *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 394 (1983) ("The National Labor Relations Act ... makes unlawful the discharge of a worker because of union activity ... but employers retain the right to discharge workers for any number of other reasons unrelated to the employee's union activities."); *Wright Line*, 251 NLRB 1083, 1089, 1980 WL 12312 (1980) (establishing a test "to determine the relationship, if any, between employer action and protected employee conduct")) (emphasis added).

The General Counsel has alleged four incidents that it claims constitute retaliatory discipline or discharge: (1) Saephan's suspension/discharge for insubordination; (2) Saephan's and Martinez's written warnings for refusing to work mandatory overtime; (3) Martinez's written warning for failing to clock out on at least two occasions; and (4) Martinez's written warning for attempting to remove confidential information and taking excessive restroom breaks. The General Counsel did not meet its burden to establish by a preponderance of the evidence that Squires was motivated by the employees' Union activities when it issued them this discipline. In any case, Squires established that it had legitimate reasons for issuing the discipline regardless of the employees' Union activity.

(a) The Evidence Shows Squires Suspended And Then Terminated Saephan's Employment For Uncontroverted Insubordination.

The undisputed evidence shows that on Thursday, October 15, 2015, Squires asked Saephan to complete a drug test because it had reasonable suspicion—based on another employee's first-hand observation that Saephan smelled of marijuana—that he was under the influence of drugs at work. Saephan did not deny that he smelled of marijuana that day.

Due to a mix-up resulting from conflicting information that Squires received from its contracted vendor for drug tests, it asked Saephan to show up the morning of Friday, October 16, for the test at a location that, unbeknownst to Squires, was closed. When Saephan informed his supervisor, Gilfillan, regarding the testing location being closed, Gilfillan texted him to "hang tight" there until Gilfillan could contact someone in management to identify an alternate testing site. Saephan's response to Gilfillan's instruction was "okay."

Despite agreeing to "hang tight," there, Saephan disobeyed Gilfillan's instruction and instead drove back to the worksite (upon the Union's orders) to participate in the Union's picketing activity that day. Gilfillan had no knowledge that Saephan would be participating in the picketing activity that day. Saephan never responded at any time on Friday, October 16, to HR Manager Bankston's request that he go to an alternate testing site she had identified for him to complete the drug test. Indeed, despite the fact that picketing was over before 1:00 p.m., Saephan never responded to Bankston's request that day. Tr. 487:11-13. He easily could have gone to the alternate testing center Bankston had identified between 1:00 p.m. and the close of business that day. Yet, he deliberately chose not to do so. By the next Monday, October 19, to Squires' reasonable understanding, the opportunity to get an accurate drug test for Saephan had passed by.

When Squires asked Saephan on October 19 to provide an explanation for his insubordination, he merely pointed to the confusion in testing sites. He did not provide any explanation for why he disregarded Gilfillan's direct instruction to "hang tight" at the testing facility while Gilfillan was identifying an alternate testing facility. Nor did Saephan provide any explanation for failing to respond to Bankston's request that he go to an alternate testing facility. Given its reasonable suspicion that Saephan was under the influence of drugs on October 15, and Saephan's undisputed failure to obey his supervisor's instruction to wait for further instructions regarding an available testing facility, Squires reasonably concluded that Saephan intentionally disobeyed a direct instruction to avoid having to take the drug test on October 16, knowing that he had the weekend (and thus more time for any trace of the marijuana to leave his system) before he had to report back to work. *See Jordan Marsh Stores Corp.*, 317 NLRB 460, 476 (1995) (a respondent has not acted unlawfully if it shows that it discharged an employee based on a

reasonable belief that the employee had engaged in conduct warranting discharge); *accord Goldtex, Inc.*, 309 NLRB 158 fn. 3 (1991).

When viewed in its entirety, the record supports only one reasonable interpretation of the decision to discharge Saephan: his employment would have been terminated irrespective of his Union-related activities. Accordingly, because the evidence shows that Squires had a legitimate reason to terminate Saephan's employment based on his undisputed insubordination, and the General Counsel did not establish by a preponderance of the evidence that Squires was motivated in any manner by Saephan's union activity, the General Counsel cannot prevail on this charge. *Epilepsy Found.* at 1105.

(b) The Evidence Shows Squires Issued Saephan And Martinez Written Warnings For Undisputed Failure To Work Mandatory Overtime.

The evidence is undisputed that both Martinez and Saephan refused to work overtime when asked on October 13, 2015—due to which Squires issued them warnings the next day. Tr. 240:8-241:19, 317:9-15, 321:23-25. Both employees were well aware of their obligation to work overtime; particularly Martinez, who previously had been warned verbally for failing to work mandatory overtime. Both also had signed acknowledgments at the beginning of their employment that they were willing to work overtime when necessary and/or that they agreed to abide by the employee handbook's policies, including the policy notifying employees that they may be asked to work overtime. While both Martinez and Saephan tried to blame Alvarez for his lack of clarity regarding whether the overtime he asked them to work was required, neither denied that they refused Alvarez's request to work overtime on the day in question. At most, this situation amounted to confusion regarding how Saephan and Martinez interpreted Alvarez's request to work overtime and Alvarez's response when they said they could not. Such confusion does not evidence discriminatory animus in imposing discipline.

(c) The Evidence Shows That Squires Issued Martinez A Written Warning For His Undisputed Failure To Clock Out On Two Different Days.

The evidence at the hearing established that during the course of performing her regular payroll duties, Bankston discovered that Martinez had not clocked out on October 7 and 14, 2015.

Tr. 907:19-908:6, Exs. R-35 and GC-21. Bankston was aware that this was not the first time Martinez had failed to clock in or out as required. Tr. 911:6-21. Consequently, Bankston determined that a written warning was appropriate.

Martinez did not deny his failure to clock out on the dates in question. Instead, he first tried to excuse his failure by stating that he proactively had resolved the issue with Gilfillan and Gilfillan had approved his subsequent correction. However, both Gilfillan and Bankston refuted that explanation with their testimony that it was Bankston and Gilfillan who first approached Martinez about the issue, not the other way around. Tr. 908:21-911:5, 863:2-14. Martinez also alluded to his failure being caused by mechanical issues with the time clock machine. Tr. 835:25-836:13, 919:5-25. However, Gilfillan never heard any other employee complain that the time clock had malfunctioned. Tr. 835:25-836:13. Nor did Saephan experience such a malfunction. Tr. 308:13-25. And, Bankston had checked other employees' time cards for those same dates, and confirmed that there was no mechanical issue with time clock. Tr. 911:22-917:2, Ex. 58-60. There was no need to go to the trouble of searching through video camera footage.

Accordingly, the evidence shows that Squires had a legitimate basis for issuing Martinez a written warning that had no relation to his Union activity.

(d) The Evidence Shows That Squires Issued Martinez A Final Warning Because He Took Excessive Restroom Breaks And Disclosed Squires Confidential Information.

The evidence shows that Martinez was observed surreptitiously trying to remove a confidential drawing from the workplace. Tr. 836:14-837:6, 932:21-933:4, Ex. GC-26. When confronted, Martinez at first tried to deny his conduct, but then admitted it. Ex. GC-26. During the meeting, Martinez tried to explain his improper conduct by claiming that he saw a paper on the ground and picked it up and placed it in his pocket thinking that that wind must have blown it outside. Tr. 839:7-15. At the hearing, Martinez recounted a different story, claiming that he recalled not being able to find a clipboard, so he had to fold the drawing and put it in his vest pocket. Tr. 522:11-523:1. He also testified that Alvarez knew he did this and that the drawing was not really confidential, but just something that was handwritten. This retrospective testimony

directly contradicts what he told Bankston and Gilfillan at the time of their meeting. Tr. 836:14-837:6, 932:21-933:4, Ex. GC-26. As such, it is not credible.

Further, over the course of several months, Gilfillan observed Martinez taking excessive "restroom" breaks—as many as 15 per day. Tr. 837:9-20. Gilfillan also noticed a pattern of Martinez using the restroom every time a lumber truck either arrived into the Suisun City facility or was leaving the facility. Tr. 837:21-838:8. During the meeting, Martinez neither denied the allegation nor provided an explanation for his excessive restroom breaks. Tr. 839:19-24. Martinez testified at the hearing that he only used the restroom two to three times a day; but again this retrospective testimony directly contradicts what he told Bankston and Gilfillan at the time. As such, it is not credible.

The General Counsel did not present any evidence showing that Squires was motivated by Martinez's Union activity to give him the final warning. Squires, on the other hand, presented evidence that it had a legitimate basis for the final warning and that such basis has remained consistent from the time of the warning through the hearing (unlike Martinez's version of events).

(e) The Evidence Shows That Squires Did Not Materially Change Employees' Working Conditions.

The General Counsel contends that Squires changed certain working conditions when it learned on September 2, 2015, of the union activity, including: (1) prohibiting employees from removing hard hats while on break unless they are sitting at the break table or in their personal vehicles; (2) temporarily removing the portable toilet (for merely one day) from outdoors to inside the building near the millworkers' break and work areas; (3) refusing to allow millworkers to use the indoor sink to wash their hands before meal and rest breaks; (4) locking its office door during business hours; (5) closing its external gates during business hours; and (6) failing or refusing to hire a direct millworker to replace Saephan, instead relying on temporary millworkers to perform the work Saephan once performed. The evidence, however, shows that none of these alleged changes was material; and, that most were motivated by safety concerns raised directly by the Union's ambush tactics.

The alleged hardhat rule change was not in fact a change at all. As Vargas, who set up the operations at the Suisun City site because of his experience at Squires' Colton site, testified, the rule prohibiting employees from removing hard hats while on break unless they are sitting at the break table or in their personal vehicles always was the rule both at the Colton site and the Suisun City site. Tr. 716:3-718:22, Ex. 43. The employees could, of course, take off their hard hats while sitting at the break table or in their personal vehicle. *Id.* Vargas implemented that rule at Suisun City site in April 2015 when it opened. *Id.* When Vargas returned to Suisun City in September (after having not been there for several months), he saw that the workers were not complying with it and were taking their hats off at the work station instead of waiting to get to the break table. Tr. 718:11-15, 720:3-22. Accordingly, he asked Alvarez to tell the workers that they had to comply with the rule. Tr. 720:3-24. Thus, contrary to the allegation, the rule did not change after September 2. Tr. 891:20-892:17, Ex. 44. Further, Gilfillan typically is driving the forklift, moving things around warehouse or out in the yard, when the employees are taking their breaks or lunch, so for safety reasons it is important that they are wearing their hardhats until they are sitting at the break table or in their personal vehicles. Tr. 762:25-763:8.

Moreover, the General Counsel did not present any evidence that any employees were disciplined due to this rule or that any employees complained about it. Additionally, as Vargas testified, it was maybe a 10-15 second walk from the working area to the break table, so even assuming a rule change occurred (which it did not), there would have been no material impact to the employees whatsoever.[13]

Similarly, the moving of the portable toilet from outdoors to inside the building near the workers' break and work areas is in consequential. The evidence shows that the portable toilet was moved for one day and then moved back. Tr. 752:13-21, 747:10-14. Even for the one day it was inside, the toilet was about 30 feet from break table. Tr. 749:2-15. Gilfillan never heard employees complain about it. Tr. 753:6-9. Nor did he notice any smell or that using it was offensive for any

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[13] Notably, Martinez, whose exaggerated testimony about the "relief" he felt when taking off his hardhat was not credible, admits wearing his hard hat even while picketing (*i.e.*, when he is not required to). Tr. 882:14-18.

reason. Tr. 753:13-25. As soon as the Company learned of employees' complaints about the toilet's location, it immediately moved it back outside. Tr. 752:13-21

The changes regarding prohibiting the employees from using the indoor sink to wash their hands, locking the office door during business hours, and closing the site's external gates during business hours, all were directly connected to the confidentiality and safety concerns that arose after the Union's organizers ambushed Gilfillan on September 2 in an attempt to coerce a legal obligation from him. As the evidence shows, the Union organizers' unannounced entrance into Gilfillan's office on the morning of September 2, before Gilfillan had taken his medication, scared Gilfillan. Therefore, Squires management took some minimal steps both to protect its confidential and proprietary information, and also to prevent Gilfillan from unwittingly committing the Company to some legal obligation.

The evidence shows that employees had to go through the business office, which contained the Company's confidential and proprietary information, including drawings of customer panel fabrications, shipping log manifests, employee information, and customer invoices, to get to the indoor sink. Tr. 760:19-761:8. Gilfillan never had agreed to let the employees use that sink. Tr. 790:22-791:1. And, previously, temporary employees never had been permitted to use the indoor sink at all. Tr. 227:4-228:2.

Moreover, the evidence shows that Squires merely closed the site's external gates, but did not lock them. Tr. 230:19-22. The General Counsel did not present any evidence showing how closing the gates impacted the employees in any material manner. Indeed, the evidence shows it was not difficult to enter the site when the gates were closed. Tr. 724:1-12. All one had to do was to roll the gates open, which took all of about 30 seconds.

Finally, the charge that Squires failed or refused to hire a direct employee to replace Saephan, and instead relied on temporary workers to perform the work Saephan once performed, simply is not true. For one thing, Squires hired Jonathan Van Loo as a direct employee on October 1, 2015. Moreover, the evidence shows that Squires has been using temporary workers to do the same work as the direct employees since it started its Suisun City operations. Indeed, every direct employee Squires has hired (including Saephan and Martinez) started out as a

temporary worker. And, as the evidence shows, Squires always has been very selective in choosing which temporary workers to transition to direct employees. Further, as discussed above, the General Counsel and the Union agree that Squires' termination of Morabito (a direct employee) did not violate the Act.

In sum, the evidence shows that alleged changes to employees' working conditions either were not actually changes or were directly connected to the Union's attempts to ambush Gilfillan necessitating minimal safeguards. Moreover, the evidence shows that the changes that actually happened only minimally, if at all, affected the employees. As such, the alleged changes do not support the General Counsel's retaliation claim.

2. The General Counsel Did Not Prove That Squires Threatened Employees With Job Loss, Arrest of Union Supporters And Picketers Or That It Engaged In Unlawful Surveillance In Violation Of The NLRA.

The General Counsel alleges that Squires' labor consultant, Ricardo Pasalagua, threatened employees with job loss and that Squires threatened to arrest Union supporters and picketers. The evidence does not support either allegation.

While a single former temporary employee testified that Squires' Labor Consultant had made two threatening statements regarding the possible discharge of direct employees and extension of time for temporary workers to be transitioned to direct employees, his testimony was refuted by Vargas, who was present at the same meeting. Tr. 723:16-18. Moreover, the General Counsel presented no other evidence supporting this single temporary employee's testimony.

As to the threat of arrest allegation, the hearsay testimony does not reflect any actual threat. Rather, the evidence shows, on the morning of October 16, 2015, Chris Paxson told Gilfillan to call the police to make sure that everybody at the site was kept safe and that nobody blocked the driveway. Tr. 797:18-798:2. Gilfillan didn't recognize any of the picketers, except for Martinez. Tr. 798:24-799:12. He told the police officer he did not know most of the individuals and wanted to make sure there was no trouble. Tr. 804:4-25. He never discussed with any police officer having individuals removed or arrested for trespassing. *Id.* When the officer returned after speaking to the picketers, he told Gilfillan that they were union organizers on public property and

entitled to be there. *Id.* Gilfillan simply said "thank you." Tr. 806:10-24. Notably, Saephan testified that he did not hear the police officers or anyone from Squires use the word "arrest". Tr. 367:4-12.

Similarly, on October 19, 2015, Paxson again asked Gilfillan to call the police to have a record of the activity and also to make sure that the picketing was peaceful. Tr. 808:12-809:3. Gilfillan had a similar conversation with the police officer as on October 16. Tr. 809:17-810:7. He did not mention anything about anybody being arrested or being removed. *Id.* Gilfillan also saw the landlord from whom Squires leased the Suisun City site speaking to a police officer on one of the days when the picketing was ongoing. Tr. 811:3-8.

The General Counsel also alleges that Squires engaged in unlawful surveillance on one occasion. Tr. 536. The evidence shows this was at most merely a fleeting mistake. On November 25, 2015, Chris Paxson had asked Gilfillan to videotape the Union's picketing outside the external gates for safety reasons. Tr. 829:19-830:24. Gilfillan had not seen any Squires employees among the picketers. Tr. 831:10-24. As soon as Gilfillan realized that Martinez was one of the picketers (and the only Squires employee among them), he quickly turned off the video, which had recorded only about a few minutes. Tr. 831:10-24, 881:1-4, 881:5-882:7, 883:8-16. Gilfillan's honest mistake, which resulted in only 14 minutes of video, at most constitutes a minor, technical violation of Section 8(a)(1). And, given that no employees other than Martinez even were aware of the videotaping, it could not have had any chilling or intimidating effect.

3. Squires Cured The Alleged Unlawful Sections Of Its Employee Handbook And, In Any Case, Never Enforced Any Of These Provisions Against Any Of Its Employees.

When Squires opened its Suisun City facility, it provided employees with copies of its employee handbook, which it had maintained since 2009. Tr. 887:11-24. The General Counsel alleges that certain sections of the handbook violate Section 8(a)(1). This allegation, like many of the General Counsel's allegations in this case, is in consequential for several reasons.

First, no employee, including Martinez and Saephan, testified that they even were aware of the technically unlawful provisions. Every employee, including Martinez and Saephan, was given an opportunity to review the handbook and ask any questions about it. Tr. 889:1-14, Ex. 56.

Second, given that the handbook was implemented in 2009, none of its policies could have been adopted in response to the union organizing, which began on September 2, 2015. Third, no evidence was presented to show that any of the handbook policies were intended or enforced in a manner that could be interpreted to chill the employees' Section 7 rights. Last, a new version of the handbook was implemented in December 2015. Tr. 887:11-24. The new version corrects the alleged technical violations. *Id.*

D. Because The General Counsel Failed To Prove That The Possibility Of Conducting A Fair Reelection Would Be Slight, It Is Not Entitled To A Bargaining Order.

Even if the General Counsel were able to prove that the Union had majority support and that Squires committed some or all of the unfair labor practices alleged (which it denies), the General Counsel failed to prove that the possibility of conducting a fair election is slight, including that that traditional remedies, such as reinstatement and posting of notices, for example, would not be sufficient. *Aqua Cool* at 97; *Overnite Transportation Co*, at 436. Indeed, the evidence demonstrated that an extraordinary remedy like a *Gissel* bargaining order is unnecessary here.

First, the evidence demonstrated that the likelihood of recurring misconduct is very low. *Overnite Transportation Co*, at 436. Most of the alleged unfair practices occurred in September and October 2015, and none have occurred since December 10, 2015—*i.e.*, almost four months now. Second, the General Counsel presented no evidence that the passage of time will not dissipate any residual impact of the alleged unfair practices. *Id.* In fact, on January 5, 2015, Squires voluntarily posted at the Suisun City site the "Employee Rights Under the National Labor Relations Act" poster[14] and a "Notice to Employees" (very similar in form and content to the Notice required by the Board as part of its traditional remedies) that addressed the specific concerns that the unfair labor practice charges raised. Putting up these posters would have helped dissipate any effects on the employees of the alleged unfair labor practices. Third, the General Counsel offered no evidence to establish that traditional remedies, such as reinstatement or posting of written notices, are insufficient here. *Id.* Rather, the evidence demonstrated that Squires is a law-abiding

[14] Appellate courts have enjoined the Board's rule requiring the posting. However, employers are free to voluntarily post, if they wish. Squires has voluntarily chosen to do so.

employer that expressly has announced to its employees that it will recognize and bargain with the Union if in fact the majority of the employees support the Union through an election. Tr. 313:8-12, 670:4-674:3, Ex. GC-23.

Because a *Gissel* bargaining order is an extraordinary remedy that is reserved for those exceptional cases where the possibility of erasing the effects of the unfair labor practices is slight, which the evidence establishes is not the situation here, the General Counsel's request for a *Gissel* bargaining order should be denied.

IV. CONCLUSION

For the reasons set forth above, Squires respectfully requests that the General Counsel's request for a *Gissel* bargaining order be denied and that charges against Squires be dismissed in their entirety.

Dated: March 31, 2016

Respectfully submitted,

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I am employed in the County of Orange, State of California. I am over the age of eighteen (18) and am not a party to this action. My business address is 1900 Main Street, Fifth Floor, Irvine, California 92614-7321.

On April 1, 2016, I served the within document described as:

RESPONDENT'S POST-HEARING BRIEF

on the interested parties in this action as stated below:

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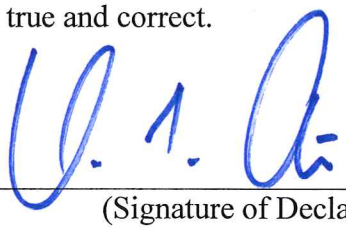
☒ **BY E-MAIL:** I electronically served the above-described document on the parties by electronically transmitting said document to the e-mail addresses listed above.

I declare under penalty of perjury that I am a member of the bar of this Court at whose direction the service was made and that the foregoing is true and correct.

Executed on April 1, 2016, at Irvine, California.

Dwight L. Armstrong
(Type or print name)



(Signature of Declarant)